

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Alaska Educational Radio System, Inc.,)	
Applications for New FM Translators)	
)	
Moose Pass, Alaska	)	Facility ID No. 156736
	)	BNPFT-20130327AND
)	
Palmer, Alaska	)	Facility ID No. 146579
	)	BNPFT-20130327ANQ
)	
Hope, Alaska	)	Facility ID Nos. 153962, 153971
	)	BNPT-20130327AOE, BNPFT-
	)	20130327AOG
)	
Seward, Alaska	)	Facility ID Nos. 156807, 156811
	)	BNPFT-20131025AAF, BNPFT-
	)	20151215AGV

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2019

Released: October 2, 2019

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application for Review (AFR) filed by Alaska Educational Radio System, Inc. (AERS), on June 14, 2019.¹ AERS seeks review of a Media Bureau (Bureau) decision dismissing its Petition for Reconsideration of a Bureau decision dismissing the captioned applications for construction permits for new FM translator stations (Applications).² For the reasons set forth below, we dismiss the AFR in part and otherwise deny it.

II. BACKGROUND

2. AERS filed four of the Applications on March 27, 2013. These applications proposed new FM translator stations serving Moose Pass,³ Palmer,⁴ and Hope, Alaska.⁵ Turquoise Broadcasting

¹ AERS captioned its pleading as a “Petition for Reconsideration.” However, it is directed to the Commission and challenges a Media Bureau (Bureau) decision dismissing a Petition for Reconsideration filed by AERS on March 1, 2019. *Alaska Educ. Radio Sys., Inc.*, File Nos. BNPFT-20130327AND, -20130327ANQ, -20130327AOE, -20130327AOG, -20131025AAF, 20151215AGV, Letter Order (MB May 15, 2019) (*Reconsideration Decision*). Accordingly, we treat AERS’ pleading as an application for review and refer to it as such herein.

² *Alaska Educ. Radio Sys., Inc.*, File Nos. BNPFT-20130327AND, -20130327ANQ, -20130327AOE, -20130327AOG, -20131025AAF, 20151215AGV, Letter Order (MB Jan. 31, 2019) (*Letter Decision*).

³ File No. BNPFT-20130327AND (Moose Pass Application).

⁴ File No. BNPFT-20130327ANQ (Palmer Application).

⁵ File Nos. BNPFT-20130327AOE and BNPFT-20130327AOG (Hope Applications).

Company, LLC (Turquoise), filed petitions to deny the applications, alleging that AERS lacked the financial qualifications⁶ necessary to construct and operate the proposed translators, as required by section 74.1233(c) of the FCC's rules (Rules) and section 308(b) of Communications Act of 1934, as amended (Act).⁷ Among other things, Turquoise referenced a report AERS filed in 2010 with the State of Alaska, Department of Commerce, Community and Economic Development, Division of Corporations, Business, and Professional Licensing (2010 Report).⁸ The 2010 Report indicated AERS had real and personal property assets of no monetary value.⁹ AERS then filed the remaining two applications at issue in this proceeding—which propose new FM translator stations serving Seward, Alaska—on October 25, 2013, and December 15, 2015.¹⁰ Turquoise also filed petitions to deny these applications, again alleging that AERS lacked the financial qualifications to construct and operate the translators it proposed.¹¹ AERS filed an Opposition to the Moose Pass and Palmer/Hope Objections; however, the Opposition did not address Turquoise's allegations about its financial qualifications.¹²

3. The Bureau then issued the *Letter Decision*, which treated the Moose Pass, Palmer/Hope, and Seward Objections as informal objections rather than petitions to deny.¹³ Because it could not determine based on the record information that AERS was financially qualified at the time it filed the Applications as required by the Commission's rules, the Bureau dismissed the Applications.¹⁴

4. AERS then filed the Petition.¹⁵ Therein, AERS questioned Turquoise's motive for filing the objections.¹⁶ AERS also argued it was financially qualified to construct and operate the translators

⁶ See 47 CFR § 74.1233(c) (“[b]efore a grant [of a construction permit for an FM translator] can be made it must be determined that . . . the applicant is . . . financially . . . qualified . . .”). See also Instructions to FCC Form 349 at 2, para. K (“applicants for new broadcast facilities must have reasonable assurance of committed financing sufficient to construct the proposed facility and operate it for three months without revenue **at the time they file**” their applications) (emphasis in original). Section 308(b) of the Act directs the Commission to assess facts such as the “financial, technical, and other qualifications of the applicant” in the application process. 47 U.S.C. § 308(b).

⁷ Petition to Deny Construction Permit of Turquoise Broad. Co., LLC, at 3, 5, 5(I), and 5(J) (filed April 16, 2013) (filed against Moose Pass Application) (Moose Pass Objection); Petition to Deny Construction Permit of Turquoise Broad. Co., LLC, at 3, 5, 5(I), and 5(J) (filed April 16, 2013) (filed against 16 AERS applications for new FM translators, including the Palmer and Hope Applications) (Palmer/Hope Objection).

⁸ Moose Pass Objection at 5(I); Palmer/Hope Objection at 5(I). The 2010 Report was the most recent report that AERS had filed with the State of Alaska at the time Turquoise filed the Moose Pass and Palmer/Hope Objections with the Commission.

⁹ Moose Pass Objection at 5(I); Palmer/Hope Objection at 5(I).

¹⁰ File Nos. BNPFT-20131025AAF (2013 Seward Application), and BNPFT-20151215AGV (2015 Seward Application) (collectively, Seward Applications).

¹¹ Petition to Deny Construction Permit of Turquoise Broad. Co., LLC, at 2, 4, and 4(H) (filed Nov. 19, 2013) (filed against 2013 Seward Application) (2013 Seward Objection); Petition to Deny Construction Permit of Turquoise Broad. Co., LLC, at 3, and 5 (filed Dec. 30, 2015) (filed against 2015 Seward Application) (2015 Seward Objection).

¹² See Opposition of AERS (filed May 16, 2003) (opposing Moose Pass and Palmer/Hope Objections). AERS did not file an opposition to either the 2013 Seward Objection or the 2015 Seward Objection. On reconsideration, AERS stated that it was not served with these objections. Petition for Reconsideration of Alaska Educ. Radio Sys., Inc., File Nos. BNPFT-20130327AND, -20130327ANQ, -20130327AOE, -20130327AOG, -20131025AAF, 20151215AGV, at 1 (filed Mar. 1, 2019) (PFR).

¹³ *Letter Decision* at 3.

¹⁴ *Id.* at 3-4.

¹⁵ Petition for Reconsideration of Alaska Educ. Radio Sys., Inc., File Nos. BNPFT-20130327AND, -20130327ANQ, -20130327AOE, -20130327AOG, -20131025AAF, 20151215AGV (filed Mar. 1, 2019).

¹⁶ *Id.* at 2.

proposed in the Applications.¹⁷ However, the Petition was not supported by any documentation demonstrating AERS' financial qualifications.

5. The Bureau dismissed the Petition as procedurally defective because it was not verified,¹⁸ and it set forth new facts and arguments that could have been presented to the Bureau prior to its dismissal of the Application.¹⁹ The Bureau also noted that, were it to reach the merits of the Petition, it would have denied it because all of the arguments raised by AERS were speculative, unsubstantiated and/or irrelevant. AERS now seeks review of the *Reconsideration Decision*.

III. DISCUSSION

6. We affirm the Bureau's decision to dismiss the Applications. AERS had two opportunities to provide probative information regarding its financial qualifications—first in response to the Turquoise objections and subsequently in response to the Bureau's *Letter Decision* dismissing the Applications. Despite these opportunities, AERS failed to provide any documentation that would have allowed the Bureau to assess whether AERS had "reasonable assurance of committed financing sufficient to construct the proposed facility and operate it for three months without revenue at the time [the applications were filed]."²⁰ Given AERS's repeated failure to provide this information, we affirm dismissal of the Applications.

7. We reject AERS's claim that, prior to the Bureau's dismissal of the Applications, it was unaware of Turquoise's argument that the reports AERS filed with the State of Alaska were "probative of [its] financial qualification[s]."²¹ Not only did Turquoise cite the 2010 Report in both the Moose Pass and Palmer/Hope Objections, but it also noted that the 2010 Report indicated AERS had real and personal property assets of no monetary value.²² Based on this, Turquoise argued that AERS did not "own any land for tower structures or studios for any of its full-service FM station[s] or any of the translators" and did not "have any equipment to support broadcast operations."²³ Having itself filed an opposition to the Moose Pass and Palmer/Hope Objections, AERS cannot now claim to have been unaware of them or the argument that Turquoise made that the 2010 Report demonstrated that AERS lacked financial qualifications. In addition, we disagree with AERS' claim that there was "nothing material or specific" in the Turquoise objections for it to address.²⁴ As discussed, Turquoise cited information that was both material and specific.

8. We affirm the Bureau's determination that, in response to Turquoise's submission of the AERS report indicating that AERS had no or minimal real and personal property assets,²⁵ AERS should have provided documentation that would have allowed the Bureau to assess whether AERS had reasonable assurance of committed financing in accordance with the Instructions to FCC Form 349 (*e.g.*,

¹⁷ *Id.* at 3-4.

¹⁸ See *Reconsideration Decision* at 3, citing 47 CFR §§ 1.52, 1.106(i).

¹⁹ See *id.* at 3-4, citing 47 CFR § 1.106(c).

²⁰ Instructions to FCC Form 349 at 2, para. K.

²¹ AFR at para. 3. To be sure, we note that AERS claimed that it was not served with Turquoise's objections to two of the six Applications. PFR at 1. AERS, however, had an opportunity to provide information relevant to AERS's financial qualifications pertaining to those two Applications when asking the Bureau to reconsider its decision. See *infra* para. 8.

²² Moose Pass Objection at 5(I); Palmer/Hope Objection at 5(I).

²³ *Id.*

²⁴ AFR at para. 4.

²⁵ *Letter Decision* at 3-4.

through a bank letter). AERS did not provide such documentation.²⁶ Indeed, even after the Applications were dismissed, AERS had another opportunity in its Petition for Reconsideration to provide the Commission with such documentation.²⁷ Although the Bureau dismissed the Petition for Reconsideration on procedural grounds, it also fully considered AERS' unsubstantiated argument that the Commission should take into consideration other resources available to it and events occurring in 2017 and 2018 that purportedly demonstrate its current ability to construct and operate the Translators.²⁸ We affirm the Bureau's conclusion that the information AERS submitted was speculative, unsubstantiated, and not probative of whether AERS had reasonable assurance of committed financing when it filed the Applications in 2013 and 2015.²⁹ Given AERS's repeated failure to provide probative information regarding its financial qualifications, we affirm dismissal of the Applications.³⁰

9. Finally, we dismiss those portions of the AFR which present material upon which the Bureau has been afforded no opportunity to pass. Specifically, pursuant to section 5(c)(5) of the Act and section 1.115(c) of the Rules, we dismiss AERS's assertions that no "accountant would assert that financial qualifications of the sort the Commission requires could be deduced from asset values,"³¹ that the translators proposed in the Moose Pass and Hope Applications are critical "to the public safety and interest,"³² and that "[i]t would be atypical for any translator applicant to provide elaboration on financial qualifications ... at the time of a window filing."³³

²⁶ Conversely, had the AERS reports to the State of Alaska shown substantial assets, the Bureau could have relied on them to deny the Turquoise Objections. See, e.g., *International Broadcasting Co.*, Memorandum Opinion and Order, 3 FCC 2d 449, 451, para. 6 (1966) ("Where . . . a party shows ownership of nonliquid assets several times the value of the cash which such assets are relied upon to yield, we cannot seriously question the ability of that party to secure the required funds.").

²⁷ AERS claims that the Bureau never requested or required a showing regarding its financial qualifications. AFR at para 5. AERS, however, was unquestionably on notice of the Bureau's concerns regarding its financial qualifications after release of the *Letter Decision*. As discussed below, in responding to the Bureau's *Letter Decision* in its Petition for Reconsideration, AERS again failed to provide probative information regarding its financial qualifications.

²⁸ See *Reconsideration Decision* at 3-4.

²⁹ To the extent that AERS makes a new argument that it constructed and operated translators both prior to and at the time the Applications were filed, AFR at para. 11, we note AERS makes this argument for the first time in the AFR in violation of Section 5(c) of the Act, and Section 1.115(c) of the Rules. 47 U.S.C. § 155(c); 47 CFR § 1.115(c)(5). Accordingly, we dismiss it.

³⁰ Our decision is further supported by statements AERS itself made in 2017 that its "annual operating budget is less than \$1000 for the previous 3 years (2015, 2016, 2017)," "there are no liquid assets," its "fixed assets amount to less than \$20,000," and a financial obligation of \$30,000 "will ultimately force AERS' facilities off the air." Letter from Wolfgang Kurtz, President, AERS, to Marlene H. Dortch, Secretary, FCC, File Nos. BRED-20130930BSV, BALED-20140121A, BRFT-20130925AAF, BALFT-20130930ASV, BRFT-20130930ASZ, BRFT-20130930ASY (dated Aug. 29, 2017).

³¹ *Id.* at paras. 8-9. AERS argues that the Commission should not look to "asset values at a prior time" as having a "bearing on future facility construction or operation." *Id.* This argument does not excuse AERS's failure to demonstrate in response that its financial situation had changed since 2010, or that for some other reason this information was not probative of its financial qualifications at the time it filed the Applications.

³² *Id.* at para. 15.

³³ *Id.* at para. 6.

IV. ORDERING CLAUSES

10. For the reasons set forth above, **IT IS ORDERED** that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended,³⁴ and sections 1.115(c) and (g) of the Commission's Rules,³⁵ the Application for Review filed by Alaska Educational Radio System, Inc., on June 14, 2019, **IS DISMISSED IN PART AND OTHERWISE DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ 47 U.S.C. § 155(c).

³⁵ 47 CFR § 1.115(c), (g).